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No. 99-699

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

After trumpeting its importance for months in the national media,[1] respondent now declares this case a routine application of "clear and well-established" law, not warranting this Court's attention. Opp. 9. It is anything but. The decision to require Boy Scouts of America, perhaps this nation's premiere private youth organization, to appoint leaders who do not accept the organization's moral code is an unprecedented intrusion into the autonomy of private organizations, throwing aside constitutional principles of free speech and association. Respondent's bold assertion that the case raises no substantial First Amendment problem[2] only underscores the need for this Court's guidance.

1. Respondent's principal theme is that our petition rests on the "false premise" that Boy Scouts of America has a moral code that is inconsistent with affirmation of homosexual conduct. Opp. 11-17. Indeed, respondent goes

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1. *E.g.*, The Advocate, Oct. 26, 1999, at 30-36 (Cover picture and story about Dale); N.Y. Times Mag., Aug. 22, 1999, at 17 (Dale pictured and quoted: "I see this case as an important community thing."); N.Y. Times, Aug. 5, 1999, at A-1 (Dale and counsel pictured; counsel quoted as stating that the New Jersey Supreme Court's ruling is "a victory for Jim Dale and it's a victory for other gay men like him"); The Boston Globe, Aug. 5, 1999, at A1 (counsel quoted as stating that the New Jersey Supreme Court's decision was a "tremendously powerful decision" that will "further the national discussion about gay youth and the need to end discrimination"); The Record, Aug. 5, 1999, at A-1 (counsel quoted as stating that the New Jersey Supreme Court decision "sends a very powerful message").

2. Since the free speech and intimate association defenses were addressed on the merits in the opinion of the New Jersey Supreme Court, 44a-50a; 64a-67a, respondent's assertion that petitioners did not raise them in the lower courts, Opp. 6, 23, is without significance. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959).

so far as to tell Boy Scouts of America that its policy violates the Scout Oath and Law. *Id.* at 12 n.8. To this we have three responses. First, it is not the business of governments or of hostile litigants to decide what a private organization's message is. As this Court stated in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, "under the First Amendment, . . . a speaker has the autonomy to choose the content of his own message." 515 U.S. 557, 573 (1995). The Oath and Law belong to Scouting, and Scouting has the sole right to interpret them. *The very argument that the government may impose its own interpretation on an organization's moral message raises First Amendment issues of the highest order.* In the *Roberts* trilogy, this Court did not disregard or second-guess the groups' official statements about their ideological views. Rather, it accepted those groups' characterization of their views, and decided the cases on the ground that their stated views were not substantially related to their practice of excluding women. *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13-14 (1988).

Second, whether the "premise" exists or not is constitutionally irrelevant. Even if Scouting did not consider homosexual conduct immoral, it would still have the right not to select a leader whose moral agenda the organization chose not to endorse. That is the only way it can control its message. Even if Scouting had not wished to take a formal stance against homosexual conduct, it could not be forced to appoint leaders who openly advocate *in favor of* the morality of homosexual conduct, or whose public position may dilute or distract from the organization's chosen message. Scouting is entitled to shape its own message, and if it believes that an individual who seeks to be a uniformed

Scout leader will not represent that message, it is entitled to decline his offer to volunteer services.[3]

On this point, this case is indistinguishable from *Hurley*. There, too, the lower court held that the parade organizers lacked a "specific expressive purpose" that would be threatened by a gay contingent. 418 Mass. 238, 249, 636 N.E.2d 1293, 1299 (1994). This Court unanimously rejected the argument, which respondent repeats here, that "a narrow, succinctly articulable message" is required as a predicate for First Amendment protection. *Compare* Opp. 15 *with Hurley*, 515 U.S. at 569. Free speech rights are not confined to the strident, nor to single-issue organizations, nor to organizations in which all members are in agreement.

Third, the so-called "*factual* finding" by the appellate courts below, Opp. 9 (emphasis in original), was nothing of the sort. This case was decided on cross-motions for summary judgment. The trial court granted summary judgment *in favor of Scouting*, finding that "[s]ince its inception Scouting has sincerely and unswervingly held to the view that an 'avowed,' sexually-active homosexual is engaging in immoral behavior which violates the Scout Oath (in which the person promises to be 'morally straight') and the Scout Law (whereby the person promises to keep himself 'clean')." 223a. The Appellate Division simply substituted a factual assumption to the contrary by noting that "[t]he parties agree that there are no genuine issues of material

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3. The public record shows Scouting declining such services since at least 1981. *See* United Press Int'l, Apr. 30, 1981 (reporting exclusion of Timothy Curran following news article quoting his belief that attending a high school prom with a male date was a political statement) (A.3660-A.3661); United Press Int'l, July 7, 1981 (Scout representatives quoted as stating that Curran did "not set good moral standards to be emulated by younger Scouts.") (A.3658-A.3659). *See also Boy Scouts of America v. Teal*, 374 F. Supp. 1276, 1279 n.2 (E.D. Pa. 1974).

fact," 111a, and by failing to recognize that "[c]ross motions for summary judgment do not preclude the existence of issues of fact," *O'Keeffe v. Snyder*, 83 N.J. 478, 487, 416 A.2d 862, 866 (1980), and are not a forfeiture of the right to have the court consider whether genuine issues of fact exist. *See Asbury Park Press, Inc. v. City of Asbury Park*, 23 N.J. 50, 56, 127 A.2d 401, 404 (1956); *Rotwein v. General Accident Group*, 103 N.J. Super. 406, 424-25, 247 A.2d 370, 381 (1968). At least the parade organizers in *Hurley* had the benefit of a trial. On this record, it is unimaginable that the highest state court concluded that Scouting's repeated official statements do not create even a *disputed issue of material fact* regarding the organization's beliefs. No other court of last resort has reached the conclusion that Scouting's message is other than what it says it is.

2. Respondent also challenges our argument that appointing an avowed homosexual and gay rights activist would impair communication of Scouting's message. Opp. 25-26. Respondent Dale's public avowal of his sexual orientation, he contends, is nonexpressive. *See id.* at 26 ("[A] gay person's simple honesty and openness about his or her identity" cannot be treated as "'advocacy,'" and Scouting is engaged in discriminatory stereotyping when it "infer[s] from such identity any particular 'viewpoint.'"). To this we have two responses.

First, respondent simply ignores the facts of this case. While some potential leaders might keep their sexuality or their dissent to themselves, that cannot be said of respondent Dale, the only person before the Court in this case. Respondent, who has not been shy about appearances in the national media, asserts a right to be "open" and "honest" about his identity. Opp. 26. That is expressive.[4] Dale's

4. In other contexts, advocates for gay rights (including respondent's counsel of record) have argued that "coming out" as a homosexual is an act of expression that warrants First Amendment protection. David Cole & William N. Eskridge, Jr., *From Hand-holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L. Rev. 319, 325 (1994) ("An admission of sexual identity is expressive in the strictest sense of the word."); Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update On the Fight Against 'Sodomy' Laws*, 21 Fordham Urb. L.J. 997, 1049 n.100 (1994) ("there are . . . inherently political dimensions to being openly gay or lesbian"). *See Fricke v. Lynch*, 491 F. Supp. 381, 384-85 (D.R.I. 1980) (holding that gay student's seeking to attend high school prom with male escort has "expressive content" and constituted a "political" "message"); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 488, 595 P.2d 592, 610 (1979) ("[T]he struggle of the homosexual community for equal rights . . . must be recognized as a political activity . . . . [O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet'"). Indeed, the Appellate Division cited Dale's expression here as "the gay's exercise of his own First Amendment right to speak honestly about himself." 149a. It is disingenuous to suggest that "coming out" is expressive when the individual seeks First Amendment protection, but is nonexpressive when organizations with contrary views prefer not to be associated with the message.

homosexual activism came to the attention of the Monmouth Council when, as head of a gay rights organization at his university, he made a public speech on the "needs of lesbian and gay teenagers." Opp. 5. He has openly stated that his purpose in this litigation is "to point out to [Scouting] how bad and wrong this policy is." A.3366-A.3367; A.3548. Even in his brief before this Court, respondent Dale goes beyond simple self-identification and advocates the position that Scouting's message "in fact violates the Scout Oath and Law." Opp. 12 n.8.

Second, Dale's argument is contrary to this Court's holding in *Hurley*. The excluded contingent in *Hurley* did not seek to express any overt opinions on sexual morality, but simply to "bear witness" to their identity as gays and lesbians. 515 U.S. at 574. Proclamations of self-identity of

this sort *do* constitute the expression of ideas, and other private speakers are entitled not to be associated with them. *Id.* at 570.[5] In *Hurley*, this Court was at pains to show that a seemingly innocuous display by a contingent in a seemingly non-ideological parade of mixed messages had First Amendment significance.

Respondent asserts that "choosing a Scouting leader," unlike marching in a parade or wearing an arm-band, is not an "act of pure speech." Opp. 29. However, very little protected expression is "pure" speech. *See Texas v. Johnson*, 491 U.S. 397, 420 (1989) (flag burning is protected speech); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992) (soliciting contributions is protected speech). Here, the organization's moral code is far more explicit than the parade theme in *Hurley*. Respondent cannot deny that the choice of a leader who is to act as a role model is important to an organization's ability to communicate to its members. And respondent Dale has admitted to his desire to communicate an opposite message. That is virtually an admission that the decision below creates a conflict with this Court's most closely-analogous precedent. If *Hurley* was rightly decided, this case follows *a fortiori*.

3. By the same token, respondent relies heavily on the *Roberts* trilogy without so much as acknowledging the differences from this case. *Roberts*, *Rotary*, and *New York State Club Ass'n* all involved organizations with a substantially

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5. Respondent's assertion that Scout leaders "are free to express their moral views pro or con on the inclusion of gay members or gay people's moral fitness — so long as they are not gay," Opp. 25, is simply false. It is undisputed in the record that Scouting units reserve the right to refuse leadership positions to any person whose service is deemed inconsistent with the organization's purposes. 38a; A.2976-A.2979. Indeed, a heterosexual affiant who supported Dale's summary judgment motion, A.4329-A.4336, was later dismissed as a Scouting leader for involving Scouting youth in his efforts to change Scouting policy barring openly homosexual leaders.

commercial purpose and effect and whose self-described philosophy was unrelated to their exclusionary practice. The Court made clear that if these factors were not present, the cases would have presented a different constitutional balance. As this Court explained in *Hurley*, the *Roberts* trilogy leaves "private club[s]" free to exclude members (let alone leaders) who do not accept the group's existing philosophy. 515 U.S. at 581; *see New York State Club Ass'n*, 487 U.S. at 13.

4. Once respondent's erroneous and legally irrelevant claims about the content of Boy Scouting's moral code and the expressiveness of respondent Dale's "honesty and openness" are put aside, his claim that this case presents no significant constitutional issue collapses. Respondent does not deny that Scouting is an expressive association. The court below conceded that "Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." 53a. Respondent does not claim that Scouting is a commercial venture, or that its activities have a primarily commercial value or content. *See Roberts*, 468 U.S. at 634-35 (O'Connor, J., concurring) (the key factor in determining protected status of expressive organizations is their noncommercial character); *New York State Club Ass'n*, 487 U.S. at 12 (emphasizing the commercial character of the associations). Respondent cannot seriously claim that the ability of an organization to choose its leaders does not affect its ability to communicate its message. *See Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 872-73 (CA2 1996) (holding that Bible club in a public school under the Equal Access Act has the right to "discriminate" on the basis of religion in its choice of president and worship leader). Nor — despite respondent's repeated observation that Boy Scouting is open to "all boys," Opp. 2, 7, 16, 30, — can he make a serious argument that an organization's openness to potential members without regard

to race or ethnicity means that it forfeits the right to insist that members (and especially leaders) share its moral code.

5. Neither does respondent offer a response to our argument, Pet. 18-19, that the close personal relationships among Boy Scouts and Boy Scout leaders, the almost parental supervisory role of leaders on camping trips and other outings, the nonpublic character of most meetings and activities, and the moral and noncommercial purpose of the organization, entitle Boy Scout Troops to constitutional protection as intimate associations. Respondent's discussion of the intimate association issue, Opp. 27-28 & n.19, is utterly unresponsive. The state has no business telling groups of this sort — or the families involved in the Scouting movement — whom they must install in positions of leadership and influence.

6. In an initial paragraph of the opposition brief, respondent asserts that Scouting is subject to the same requirements as public schools or military bases which have agreed to sponsor Boy Scout Troops, Opp. 1-2 & n.3;[6] in the concluding paragraph of the opposition brief, respondent suggests that this case does not warrant review because Boy Scouts of America is "atypical" because of "government entanglement" and "special presence in the schools." Opp. 29-30. While such entities have sponsored Scouting — particularly in inner-city areas where family

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6. While religious organizations sponsor over 60 per cent of Scouting units, public schools sponsor slightly over 8 per cent and other government bodies such as military bases sponsor less than 5 per cent of Scouting units. The religious organizations which have filed briefs as *amici curiae* in support of petitioners sponsor about 75 per cent of all Scouting units sponsored by religious groups. Putting aside the Methodist social action group which has taken a different view from the Methodist group responsible for the Church's relationship with Scouting, the religious organizations which have filed a brief as *amici curiae* in support of respondent include only about 2 per cent of the religious sponsors of Scouting units.

and neighborhood support for boys is weak or, as in the military, where attempts are made to approximate civilian life — all sponsors agree to conduct the program in accordance with the policies of Boy Scouts of America. A.3158. In other lawsuits, advocacy groups have sued government entities to force their dissociation from Scouting because of Scouting values. *Winkler v. Chicago Public Schools*, No. 99C 2424 (N.D. Ill. filed Apr. 14, 1999) (brought as defendant class action); *Winkler v. City of Chicago*, No. 97C 2475 (N.D. Ill filed Apr. 10, 1997) (settlement entered Feb. 4, 1998).

Many private organizations have relationships of various sorts with governmental entities, without thereby forfeiting their constitutional rights. State action doctrine draws the line between genuinely private action, which is entitled to constitutional protection, and ostensibly private action that is so entangled with the state that it must be covered by governmental norms. At no point in this litigation has respondent contended, or the New Jersey courts held, that Boy Scouts of America is anything but a private actor.[7] Accordingly, it has First Amendment rights. If New Jersey wishes to withhold public sponsorship or other benefits to the organization on account of its policies, or if respondent wishes to bring an action against governmental entities claiming that their relationship with Scouting is illegal or unconstitutional, that would raise different issues; but the existence of public

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7. All corporations, even religious corporations, necessarily have government charters. Scouting's federal charter does not make it a state actor or negate its First Amendment rights. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding that a governmentally-created corporation is a public actor only if the government retains permanent authority to appoint a majority of its board of directors); *Hall v. American Nat'l Red Cross*, 86 F.3d 919, 921-22 (CA9), *cert. denied*, 519 U.S. 1010 (1996); *Hack v. President & Fellows of Yale College*, 16 F. Supp. 2d 183 (D. Conn. 1998), *appeal pending*, No. 98-9136 (CA2).

benefits does not entitle the government to invade a private organization's speech and associational rights.

7. Finally, even if respondent's interpretation of First Amendment principles were more plausible than we suppose, that does not detract from the importance of this case, or the need for *certiorari* review. The clash between public accommodation laws and the free speech and associational rights of private organizations has wide ramifications for our society. Few legal issues in recent years have aroused such widespread public attention or controversy. Whichever side is correct, this is a constitutional issue so important to the American way of life that resolution cannot be left to lower courts. This Court's guidance is urgently needed.

CONCLUSION

For these reasons and those stated in the petition, this Court should issue a *writ of certiorari* to review the judgment of the New Jersey Supreme Court in this case.

Respectfully submitted,

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